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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTER OF THE INVOLUNTARY )  
TERMINATION OF THE PARENT-CHILD )  
RELATIONSHIP OF A.M. AND J.M., MINOR )  
CHILDREN AND THEIR FATHER, JEREMIAH )  
MAXEY, )

JEREMIAH MAXEY, )

Appellant-Respondent, )

vs. )

DIVISION OF FAMILY AND CHILDREN, )

Appellee-Petitioner, )

And )

CHILD ADVOCATES, INC., )

Co-Appellee (Guardian ad Litem). )

No. 49A04-0610-JV-574

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APPEAL FROM THE MARION SUPERIOR COURT – PROBATE DIVISION  
The Honorable Victoria Ransberger, Judge Pro Tempore  
Cause No. 49D09-0506-JT-024782

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**May 11, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

**Case Summary**

Jeremiah Maxey appeals the involuntary termination of his parental rights to A.M. and J.M. Maxey argues that he was denied due process in violation of the Fourteenth Amendment to the United States Constitution because the judge was biased or prejudiced against him. Because the judge's comments and questions do not indicate partiality or bias and the court's termination of Maxey's parental rights was based on clear and convincing evidence, we affirm the judgment of the trial court.

**Facts and Procedural History**

Aдриene McCurtis gave birth to A.M. in 2001 and J.M. in 2004. Maxey is the alleged father of both children but has not established paternity, and McCurtis was the sole legal custodian of the children. In 2003, Maxey was convicted for drug possession and incarcerated from June 5, 2003, until August 24, 2003. On or about October 16, 2004, the Marion County Office of Family and Children, hereinafter referred to as the Marion County Department of Child Services ("MCDCS"), determined that A.M. and J.M. were Children In Need of Services ("CHINS") because J.M. tested positive for cocaine at birth, McCurtis was using cocaine on a regular basis while the children were in her care and custody, and McCurtis had once been arrested leaving no one with legal responsibility available to care for the children for a period of time. Thereafter, the

MCDCS filed a petition seeking temporary custody and/or supervision over the children. Maxey admitted that the children were CHINS. This admission led the court to find the children to be CHINS as to Maxey. The court also found the children to be CHINS as to McCurtis. This resulted in the children becoming wards of the MCDCS. Soon thereafter, both children were placed in their maternal great aunt's home, where they have since received adequate care.

Thereafter, the court ordered Maxey and McCurtis to make contact with the case manager, to secure and maintain a legal and stable source of income, to obtain suitable housing, to participate in and complete a home-based counseling program, to complete a parenting assessment program, to participate in and complete a drug and alcohol assessment, to submit to random drug testing, to complete substance abuse treatment programs, to prohibit the use of non-prescription drugs in the home, and to establish paternity as to A.M. and J.M. Except for partial completion of the parenting assessment program, Maxey did not participate in or complete any services as required by the trial court's dispositional order.

On June 29, 2005, the MCDCS filed a petition to terminate the parent-child relationship of both McCurtis and Maxey as to A.M. and J.M. Before trial, in December 2005, Maxey was convicted, for a second time, for drug possession and was sentenced to a term of incarceration in the Indiana Department of Correction. Maxey's earliest possible release date is June 2007.

At the outset of the trial on the MCDCS's petition to terminate, Maxey was called to testify by the MCDCS. During his testimony, the court interrupted the MCDCS's line of questioning and entered into the following dialogue with Maxey:

THE COURT: And so let me get this straight, we're here doing a termination trial on these two little people, and you don't even get out for over a year now?

FATHER: Yes.

THE COURT: Why are we trying this today?

FATHER: I wasn't just about to sign my rights over, naw. I wasn't about to just . . .

THE COURT: I'm sorry? I can't, I couldn't understand what you just said.

FATHER: Can you repeat the question?

THE COURT: Yes. I'm wondering why we're here going through a trial to terminate your parental rights, when you don't get out for over a year yet. When do you plan to parent these two little people?

FATHER: When I get out of prison.

THE COURT: When you get out? So I should leave them in care?

FATHER: I'm trying, like, not, right, right now I'm trying to write the, I'm writing the Judge to see, cause I finished some programs to see if he can give me a credit time class. At least 190 something days, or 183. Cause I did certain programs and I'm in certain programs right now to see if I can be able to get out early.

THE COURT: So at the most, then that would be next June. So we would just leave the kids in care until next June?

FATHER: M . . .

THE COURT: In case you get out early?

FATHER: I mean I can't, I, that, I don't have no control over it.

THE COURT: All right. I'm just understanding kind of this situation. Why you're pursuing a trial on termination of parental rights when you have no way to parent these kids for some time yet. I mean. All right. More questions for dad.

Trial Tr. p. 9-10. No objection was made in response to this dialogue. Maxey later testified that he did not have suitable employment or housing arranged for himself or for his children upon his release from prison, and acknowledged that he could not "just jump into being a parent" upon his release from prison. Appellant's App. p. 12. The court determined:

19. From his pattern of criminal conduct in the recent past, and his failure to engage in services to remove the conditions which resulted in the continued removal of the children from his care, Mr. Maxey has not demonstrated that he can provide consistent and sufficient care for the children upon his projected release from prison, which results in a probable risk of harm to the children should they be placed in his care.

Appellant's App. p. 11 (Findings of Fact 19). The court further determined that the young children were in need of a permanent caregiver who they could depend on daily, and that Maxey could not provide such consistent care. Once the trial was completed, the court issued an order terminating Maxey's parental rights.<sup>1</sup> Maxey now appeals.

### **Discussion and Decision**

Maxey raises one issue on appeal. He argues that the trial court denied him his constitutional right to a fair trial under the Fourteenth Amendment to the United States Constitution because "the judge was biased or prejudiced against him." Appellant's Br. p. 7.

Indiana Code § 31-35-2-4(b)(2) provides that a petition to terminate parental rights must allege, in pertinent part, that:

(B) there is a reasonable probability that:

(i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied;  
or

(ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;

(C) termination is in the best interests of the child; and

(D) there is a satisfactory plan for the care and treatment of the child.

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<sup>1</sup> The trial court also terminated McCurtis's parental rights. McCurtis is not a part of this appeal.

The petitioner must prove each of these elements by clear and convincing evidence. Ind. Code § 31-37-14-2; *see also In re D.L.*, 814 N.E.2d 1022, 1026 (Ind. Ct. App. 2004).

Maxey argues that the above cited dialogue between him and the court is evidence of the trial court's partiality and bias. Specifically, Maxey argues that the trial court was biased and prejudiced against him because "the judge expressed her opinion that Mr. Maxey should have consented to the involuntary termination of his parental rights because he was in prison at the time of the termination hearing." Appellant's Br. p. 8. We cannot agree.

We first note that no objection was made at trial to the above referenced dialogue between the court and Maxey. Typically, a failure to object at trial results in waiver of the issue on appeal. *Stellwag v. State*, 854 N.E.2d 64, 66 (Ind. Ct. App. 2006). However, we review a claim of improper judicial intervention and will not apply the waiver doctrine due to the importance of a fair trial by an impartial judge and jury. *Id.* (citing *Kennedy v. State*, 258 Ind. 211, 218, 280 N.E.2d 611, 615 (1972)). Thus, a claim alleging a biased judge is reviewed for fundamental error and therefore not waived if raised for the first time on appeal.

A trial before an impartial judge is an essential element of due process. *Stellwag*, 854 N.E.2d at 65. The law presumes that a judge is unbiased and unprejudiced. *Smith v. State*, 770 N.E.2d 818, 823 (Ind. 2002). This presumption, though, may be rebutted if the defendant can establish from the judge's conduct an actual bias or prejudice that places the defendant in jeopardy. *Id.* Such bias and prejudice exists only where there is an undisputed claim or where the judge expressed an opinion regarding the controversy over

which the judge was presiding. *Id.* An adverse ruling by itself is insufficient to show bias or prejudice. *Flowers v. State*, 738 N.E.2d 1051, 1060 n.4 (Ind. 2000), *reh'g denied*. Admittedly, the trial court has a duty to remain impartial and refrain from unnecessary remarks. *Massey v. State*, 803 N.E.2d 1133, 1139 (Ind. Ct. App. 2004). Nonetheless, it also has a duty to conduct the trial in a manner calculated to promote the ascertainment of truth, fairness, and economy of time. *Id.*

After reviewing the record, we find no support for Maxey's claim of prejudice or bias. The comments and questions by the judge do not indicate partiality or bias. They were proper preliminary questions asked in an effort to understand the timing under which the termination hearing was brought. Maxey's responses to the court's questions provided the court with clarification and a better understanding of the circumstances surrounding the termination hearing.

Additionally, the trial court's termination of Maxey's parental rights was based on clear and convincing evidence. Specifically, the trial court found that Maxey's criminal conduct and failure to correct the conditions that resulted in the removal of the children, coupled with the children's need for a permanent caregiver upon whom they can depend on every day, support the termination of his parental rights. Appellant's App. p. 11 (Findings of Fact 19 & 20). Maxey does not challenge the court's findings of fact or conclusions of law.

Because the judge's comments and questions do not indicate partiality or bias and because termination of Maxey's parental rights is supported by clear and convincing evidence, we affirm the trial court.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.